No. 11,457

United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administratrix of the Estate of Jakor Aleksich, deceased,

Appellant,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, a corporation,

Appellee.

Supplemental BRIEF OF APPELLANT

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SUPPLEMENT TO REPLY BRIEF OF APPELLANT

"Language adopted in their policies by various insurance companies is so diverse that almost every case stands on its own peculiar facts and is incapable of any great extension as a precedent in other cases."

North Carolina Ins. Co. vs. Terrell, (Alabama) 150 So. 318, 89 A. L. R., 1459.

"Perfect Income Policy" and "Insures Against Loss of Time" are each sufficiently definite and certain to be enforced.

"Fully Insured" was enforced:

Kentucky Wagon Co. v. People's Supply Co., 77 S. C. 92, 37 S. E. 676—122 Am. St. Rep. 540.

"Do the right thing if injured man does not recover in six weeks" was declared enforceable for just about what plaintiff claims here. "Juries are constantly solving such problems."

Brennan v. Employer's Liability Assurance Corp., 213 Mass. 365, 100 N. E. 948.

Here promisee seems to have been dead before suit was concluded.

See also:

Silver v. Graves (Mass.) 95 N. E. 289;
Noble v. Joseph Bennett Co., (Mass.) 94 N. E. 289.

"So a promise for services that a testator would leave the promisee 'full and plenty after he was gone so that she need not work' was enforced as an obligation to leave an amount sufficient to buy an annuity that would support the promisee in the mode of life to which she had been accustomed.

Williston on Contracts, par. 4.

Enforcement of contracts to care for a person for life in consideration of conveyance of realty is quite well known and favored by the courts.

White v. Massee (Iowa), 211 N. W. 839.

"A contract includes not only what the parties said, but also what is necessarily implied from what is said."

Williston on Contracts, par. 22A-37, Note 6.

"When one intention appears in one clause in an instrument, and a different conflicting intention appears in another clause in the same instrument, that intention

should be given effect which appears in the principal, or more important clause.

Williston on Contracts 624 p. 1796, Vol. 3.

What the parties think an integrated contract means as against the legal effect is irrelevant.

"The thought of man is not triable, for the devil himself knows not the thought of man."

Williston on Contracts, par. 22. Note 3.

Appellee would strain unduly the usual meaning of the word 'respectively'. They would have it modify (1) Loss of time due to accident; (2) loss of time due to disease, found ahead of this word in the insuring clause; (3) and also modify all that follows it in the insuring clause. It may be a scatter gun, but it does not shoot both ways at once when there are two or more things preceding it which it can modify. As an adjective 'respective', like all adjectives in English, is used ahead of its noun, i. e., respective counsel. When it becomes an adverb, it reassumes its prefix meaning of "backwards," as in 'return', 'revert', 'recapitulate', and is placed after what it modifies; so used in a contract construed in

Ulman v. Manheimer, C. C. A. 6, 249 Fed. 691.

Or, for instance, "counsel for appellant and appellee, respectively agreed, etc." If any such meaning could be given it as appellee desires, it would result in an ambiguity to be resolved against appellee.

There is, in the Montana Court's opinion, not a word denying liability for loss of time *due to accident.* It is not conceivable that the Montana Court intended to, with-

out argument, overrule its many decisions sustaining liability for future earning capacity, though quick (not instantaneous) death occur. The random remark found in it "That even though the policy should be considered broad enough to include indemnity for loss of time resulting from *death,* the only possible cause of action, under the circumstances, would be in favor of the estate of the insured," begins in the usual words of obiter dictum. It is more like an invitaion to sue than a foreclosure.

Aleksich v. Mutual Benefit Health & Accident Association, ...Mont.; 164 Pac. (2nd) 372.

Thus obiter dictum begins in

Freeman v. Bee Machine Co., 319 U. S., 447 at p. 453.

The lack of merit of such as a precedent is exemplified in

Moss v. Atlantic Coast Line Ry. Co. (C. C. A. 2nd), 157 Fed. (2nd) 1005.

Respectfully submitted,

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